IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.810 OF 2004

Shri Pramod Maniklal Lunawat. ... Appellant.

V/s.

M/s. Lunawant Bhor Construction Pvt.Ltd. ... Respondent

Mr. Anil V. Anturkar, advocate for Appellant.

Mr.T.N.Subramanyam with Smt.Chandana S.Radia, advocate for Respondent.

Coram: Smt.Nishita Mhatre, J.
Dated: 20th October, 2004.

P.C. :

1. Appeal from Order has been filed against the order on Exh. 5 in Spl. Civil Suit No. 377 of 2004. It is the contention of the appellant that he was entitled to interim relief by way of a permanent injunction against the respondent from carrying out any type of construction or from dealing with the Transferable Development Right (TDR) and Floor Space Index of the Staircase(FSI) in respect of the suit property.

2. It appears that an agreement was entered between the respondent and society for development of a certain plot of land. There were certain disputes between the members of the Society and respondent/defendant in the suit. Settlement of disputes was possible on account of certain efforts made by the appellant/plaintiff. In view of these efforts made by the appellant/plaintiff an

agreement was arrived at between the appellant/plaintiff on the one hand and the respondent/defendant on the other, on 29th June, 1995 wherein it was agreed that the benefits of the additional Staircase FSI and use of TDR would be assigned to the Appellant/plaintiff as and when permitted by the Pune Municipal Corporation. Clause (2) of this agreement made it clear that the parties accepted that D.C.Rules for use of TDR or Staircase FSI were not sanctioned by the State Government and such sanction was awaited. In consideration of the efforts made by the appellant/plaintiff it was agreed that the available staircase FSI and the TDR over the suit property would be assigned to the appellant/plaintiff. Almost a year later, a supplementary agreement was entered into between the two parties. Under this supplementary agreement, it was agreed that the defendant would pay to the plaintiff an amount of Rs.75/- per sq.ft. in respect of the actual Staircase FSI and TDR when available. Clauses of the agreement read as follows:

> (1) The Party of the First Part shall pay to the Party of the Second Part the price of the actual Staircase F.S.I. at the rate of Rs.75/- per Sq.Ft. in respect sof the property bearing Survey No.91/1/9 before 30th August, 1996.
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> (2) On receiving the entire price of the Staricase F.S.I., the rights and interest of the Party of the Second Part, acquired by the him under the said Agreement dated 29/6/1995, in respectd of the staircase F.S.I. shall come to an end and thereafters

only the party of the First Part shall be entitled to carry out the development work of the said property in respect of the said F.S.I.

(3) Similarly the Party of the First Part shall pay to the Party of the Second Part the price of the T.D.R. in respect of the said property bearing Survey No.91/1/9 at the rate of Rs.75/- per Sq.ft., within three months from the date of getting the said T.D.R. On receiving the entire price of the said T.D.R., the rights and interest of the Party of the Second Part in respect of the benefits of T.D.R., acquired by him, under the Agreement dated 29/6/1995, shall come to an end.

(4) In the event of the Party of the First Part failing to pay to the Party of the Second Part, the entire price of the actual F.S.I. before 30th August 1996, or the price of the T.D.R. within three months from its availability then the Party of the Second Part shall be entitled to have recourse to the legal remedy of filing suit for specific performance of this Agreement as well as of the Agreement dated 29/6/1995 and / or suit for declaration and injunction, restraining the Party of the First Part from carrying out the development work of the said property bearing S.No.91/1/9 and / or money suit.

3. The questions raised for consideration are (i) whether time was the essence of the contract between the parties. If time was the essence of the contract between the parties, (ii) whether the suit has been filed within the period of limitation and (iii) whether the plaintiff is entitled to any interim relief. The Trial Court in my view has come to the right conclusion that the plaintiff has not substantiated his case, prima

facie. The trial court has also come to the conclusion that the balance of convenience is not in favour of the plaintiff. The Clauses of the agreement in my view indicate that payment in respect of the TDR was to be made within 3 months from the date of 'getting' the said TDR. In my view, the word 'getting' would obviously in the present context means purchasing the TDR from the market, after the D.C. Rules permitting purchase of TDR for being loaded on to a building came into force. Admittedly when the notification came into force in 1997, the TDR was purchased by the defendant and became available to it in 2004. As per the letter dated 24th June, 2004 it was necessary to pay the amount at the rate of Rs.75 per sq.ft as agreed within 3 months. The defendants accordingly forwarded the cheque for an amount of Rs.10,97,550/- which the respondent refused.

4. In my view, having purchased the TDR just prior to the notice dated 24th June, 2004, the defendants prima facie have sought to make payment within 3 months from that date. The Trial Court therefore has rightly come to the conclusion that no prima facie case has been made out by the plaintiff. Furthermore, there is an averment made in the affidavit filed in this Court by the director of the Respondent Company that the staircase FSI in respect of the suit property was sanctioned in 1997 for which a premium of Rs. 1,72,440/- has been paid to the Pune Municipal Corporation by the

Respondent. An amount of Rs.49,000/- has been paid to the plaintiff by cheque dated 3/7/1991 as stated in the affidavit before the Trial Court, towards the staircase FSI. It appears that this affidavit has not been denied by the plaintiff. According to the defendant the staircase FSI has been availed of and used way back in the year 1997.

5. The suit which has been filed seeks a declaration that the defendant has no authority to use TDR and staircase FSI in the suit property and that the plaintiff is entitled to use the same. The suit has not been filed for specific performance of the contract. The cause of action which has been made out is that the defendant obtained sanctioned plans for use of the staircase FSI on 24th June, 2004 and therefore, according to the plaintiff the suit is filed within limitation. It appears that prima facie two contrary stands have been taken by the plaintiff in the plaint; namely that time being essence of the contract, the payment ought have been made in respect of the FSI on or before 1996 and in case of TDR on or before 1997. Assuming that is correct then, the suit ought to have been filed within 3 years from those dates. The present suit has been filed some time in 2004 only after the payment of approximately Rs.10 Lakhs was tendered to the plaintiff. If the plaintiff had any real cause, prima facie, he ought to have filed the suit within 3 years of

the defendants failing to fulfil the contract. The Plaintiff cannot seek any interim relief at this stage.

6. It is submitted on behalf of the plaintiff that there is a reconveyance of the property since the parties have agreed to reconvey the FSI and TDR to the plaintiff. According to the Learned advocate for the plaintiff time is always the essence of contract for reconveyance of the property and he places reliance on the Judgment of **Bismillah Begum V/s Rahmatullah Khan reported in (1998) 2 Supreme Court Cases 226** for this proposition. In this case the Apex Court was dealing with a contract for reconveyance of the property. In this situation the Apex Court was of the view that time is always the essence of the contract for reconveyance of any of immovable property. There is no dispute that TDR is treated as movable property. Therefore, this Judgment would have no application to the facts of the present case.

7. A submission is then made by the learned advocate for the appellant that an order granting status quo ought to be made as the plaintiff would be greatly prejudiced if the defendant is permitted to construct the flats by consuming the TDR and Staircase FSI. The learned advocate for the defendant states that the flats which have been built by consuming Staircase FSI have already been sold to third parties, prior to the filing

of the suit, by registered agreements. These flats are in use and occupation of the flat purchasers. He submits that if the plaintiff succeeds he would be entitled to damages and therefore, no case has been made out for granting status quo.

8. In my view, after considering facts of the case and the submissions made, the Trial Court has rightly come to the conclusion that since there is no suit for specific performance, the plaintiff can be compensated in monetarily. That being the position, I do not think it is necessary to pass any order directing status quo to be maintained.

9. A.O. is therefore, dismissed and the order on Exh.5 is confirmed.

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CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 1113 OF 2004

IN

APPEAL FROM ORDER NO.810 OF 2004

Shri Pramod Maniklal Lunawat. ... Appellant.

V/s.

M/s. Lunawant Bhor Construction Pvt.Ltd. ... Respondent

Mr. Anil V. Anturkar, advocate for Appellant.

Mr.T.N.Subramanyam with Smt.Chandana S.Radia, advocate for Respondent.

Coram: Smt.Nishita Mhatre, J.

Dated: 20th October, 2004.

P.C. :

. In view of the dismissal of the Appeal from Order, Civil Application does not survive. Hence dismissed accordingly.

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